

**COUNTY OF SAN LUIS OBISPO BOARD OF SUPERVISORS
AGENDA ITEM TRANSMITTAL**

(1) DEPARTMENT Planning and Building	(2) MEETING DATE 6/17/2014	(3) CONTACT/PHONE Murry Wilson, Environmental Resource Specialist / (805) 788-2352	
(4) SUBJECT Hearing to consider a resolution setting forth a determination of established vested right(s) at the Whale Rock Pit / Cayucos Pit – CA Mine ID #91-40-0010; located at 1424 Old Creek Road, east of the community of Cayucos, including the scope and nature of surface mining activities included within the established vested right(s). District 2.			
(5) RECOMMENDED ACTION That your Board adopt and direct the Chairperson to sign the resolution setting forth a determination of established vested right(s) at the Whale Rock Pit / Cayucos Pit – CA Mine ID #91-40-0010 located at 1424 Old Creek Road, east of the community of Cayucos including the scope and nature of surface mining activities included within the established vested right(s), as follows: <ol style="list-style-type: none"> 1. Vested Rights associated with the Horizontal Limits of the Mining Area shall be limited to the area described as “current use” and “future potential” in Figure 4 - Reclamation Plan Map and Figure 9 – Cross Sections. No mining outside of the area identified in Figure 4 – Reclamation Plan Map and Figure 9 – Cross Sections shall be recognized as a vested mining right. 2. Vested Rights associated with the Vertical Limits of the Mining Area shall be limited to the unconsolidated material (i.e. Red Rock) within approximately 30 feet of the original ground surface. No mining of consolidated material (hard rock) shall be recognized as a vested mining right. 3. Vested Rights associated with the Maximum Annual Production shall be limited to the 8,000 cubic yards per year. 4. Vested Rights associated with the Type of Mining shall be limited to “dozing into stockpiles to be spread upon reclamation” and “pile to one side and dozed to grade later”. No Blasting, Crushing, Processing / Sorting, Importation of fill for reclamation (stockpiling), or Recycling shall be recognized as a vested mining right. 			
(6) FUNDING SOURCE(S) Planning Department General Fund	(7) CURRENT YEAR FINANCIAL IMPACT N/A	(8) ANNUAL FINANCIAL IMPACT N/A	(9) BUDGETED? Yes
(10) AGENDA PLACEMENT <input type="checkbox"/> Consent <input type="checkbox"/> Presentation <input checked="" type="checkbox"/> Hearing (Time Est. <u>90 minutes</u>) <input type="checkbox"/> Board Business (Time Est. <u> </u>)			
(11) EXECUTED DOCUMENTS <input checked="" type="checkbox"/> Resolutions <input type="checkbox"/> Contracts <input type="checkbox"/> Ordinances <input type="checkbox"/>			
(12) OUTLINE AGREEMENT REQUISITION NUMBER (OAR) N/A		(13) BUDGET ADJUSTMENT REQUIRED? BAR ID Number: <input type="checkbox"/> 4/5 Vote Required <input checked="" type="checkbox"/> N/A	
(14) LOCATION MAP Attached	(15) BUSINESS IMPACT STATEMENT? No	(16) AGENDA ITEM HISTORY <input checked="" type="checkbox"/> N/A Date: <u> </u>	
(17) ADMINISTRATIVE OFFICE REVIEW Lisa M. Howe			
(18) SUPERVISOR DISTRICT(S) District 2			

County of San Luis Obispo



TO: Board of Supervisors

FROM: Planning and Building / Murry Wilson, Environmental Resource Specialist

VIA: Ellen Carroll, Planning Manager / Environmental Coordinator

DATE: 6/17/2014

SUBJECT: Hearing to consider a resolution setting forth a determination of established vested right(s) at the Whale Rock Pit / Cayucos Pit – CA Mine ID #91-40-0010; located at 1424 Old Creek Road, east of the community of Cayucos, including the scope and nature of surface mining activities included within the established vested right(s). District 2.

RECOMMENDATION

That your Board adopt and direct the Chairperson to sign the resolution setting forth a determination of established vested right(s) at the Whale Rock Pit / Cayucos Pit – CA Mine ID #91-40-0010 located at 1424 Old Creek Road, east of the community of Cayucos including the scope and nature of surface mining activities included within the established vested right(s), as follows:

1. Vested Rights associated with the **Horizontal Limits of the Mining Area** shall be limited to the area described as “current use” and “future potential” in Figure 4 - Reclamation Plan Map and Figure 9 – Cross Sections. No mining outside of the area identified in Figure 4 – Reclamation Plan Map and Figure 9 – Cross Sections shall be recognized as a vested mining right.
2. Vested Rights associated with the **Vertical Limits of the Mining Area** shall be limited to the unconsolidated material (i.e. Red Rock) within approximately 30 feet of the original ground surface. No mining of consolidated material (hard rock) shall be recognized as a vested mining right.
3. Vested Rights associated with the **Maximum Annual Production** shall be limited to the 8,000 cubic yards per year.
4. Vested Rights associated with the **Type of Mining** shall be limited to “dozing into stockpiles to be spread upon reclamation” and “pile to one side and dozed to grade later”. No Blasting, Crushing, Processing / Sorting, Importation of fill for reclamation (stockpiling), or Recycling shall be recognized as a vested mining right.

DISCUSSION

The Surface Mining and Reclamation Act (“SMARA” or the “Act”) was enacted by the State Legislature in 1975 to regulate surface mining operations in the state. Under that Act, existing surface mining operations were allowed to continue mining without a permit to the extent they had obtained vested rights to do so prior to January 1, 1976. The Whale Rock Pit, located east of Cayucos, is one such surface mine in the County that began operations prior to January 1, 1976. The purpose of this hearing is to identify the extent and scope of the Whale Rock Pit’s vested rights, as that term has been defined by SMARA, the California Code of Regulations, the County’s Land Use Ordinance (Title 22), and applicable case law.

Vested Right is defined by Section 22.36.040, subsection D of the Land Use Ordinance as, *“For the purposes of surface mining operations only, a person is deemed to have a vested right if, prior to January 1, 1976, he has in good faith and in reliance upon a permit or other authorization, if a permit or other*

authorization was required, diligently commenced surface mining operations and incurred substantial costs for work and materials necessary therefor. Expenses incurred in obtaining an amendment to the Land Use Element, or the issuance of a permit to establish or expand a mine, are not deemed costs for work or materials."

To determine the vested rights for the subject mine, this report will present information contained in the various mining files on record with the County Department of Planning and Building, information obtained from the Operator, as well as records obtained from the Office of Mine Reclamation (OMR).

A summary of the activities at the mining site as well as the history of local ordinances related to surface mining are contained herein. The report then presents the legal standard associated with non-conforming / vested mining activities and describes the factors your Board should consider in making its determination on the scope and nature of vested rights. Your Board will be presented with various components of the mining activities and then be presented with evidence supporting Staff's recommendation on the scope and nature of vested rights for each individual component of the mining activities.

Staff Comments:

Staff recognizes that the Operator wishes to continue and expand the existing mining operation. In response to a lawsuit and Stipulated Judgment filed January 3, 2014, this Vested Rights Hearing is being held. Once the Vested Rights have been determined, permit requirements and compliance can be determined.

Background:

The property at issue is currently known as the Whale Rock Pit and is located at 1424 Old Creek Road, east of the community of Cayucos (approximately 4,000 feet northeast of the intersection of Montecito Road and Old Creek Road). The parcel on which the mine is located is approximately 235 acres and is located southeast of Whale Rock Reservoir. In 1958 the State Department of Water Resources (DWR) obtained an "Order of Immediate Possession" for the quarry property and on April 29, 1959 DWR finalized eminent domain proceedings over numerous parcels including the quarry property. The Interlocutory Judgment in Condemnation of Parcels 3A, 3B, 3C and 3D granted DWR a five-year "*profit a prendre*" to remove rock from the quarry property (see Figure 1 - Parcel 3D) for construction of the Whale Rock Reservoir. It is unclear as to the exact date when mining began on the subject parcel. According to the County Certificate of Vested Rights Application for the mine known as the "*Cayucos Pit*", the history of mining operations were described as "*excavation looking for the rock face*" beginning sometime in 1958 (see Attachment A – Page 5 of 8). Figure 1 is a map found in the approved Reclamation Plan which was created as part of the above referenced condemnation process. The map was submitted as part of the Reclamation Plan application and is relevant to this determination hearing because it represents *objective evidence of the future mining activities*.

In 1975, the California Legislature enacted the Surface Mining and Reclamation Act (SMARA), which requires all surface mining operations to obtain a reclamation plan covering operations after January 1, 1976, and requires operations commenced after that date to obtain a use permit.

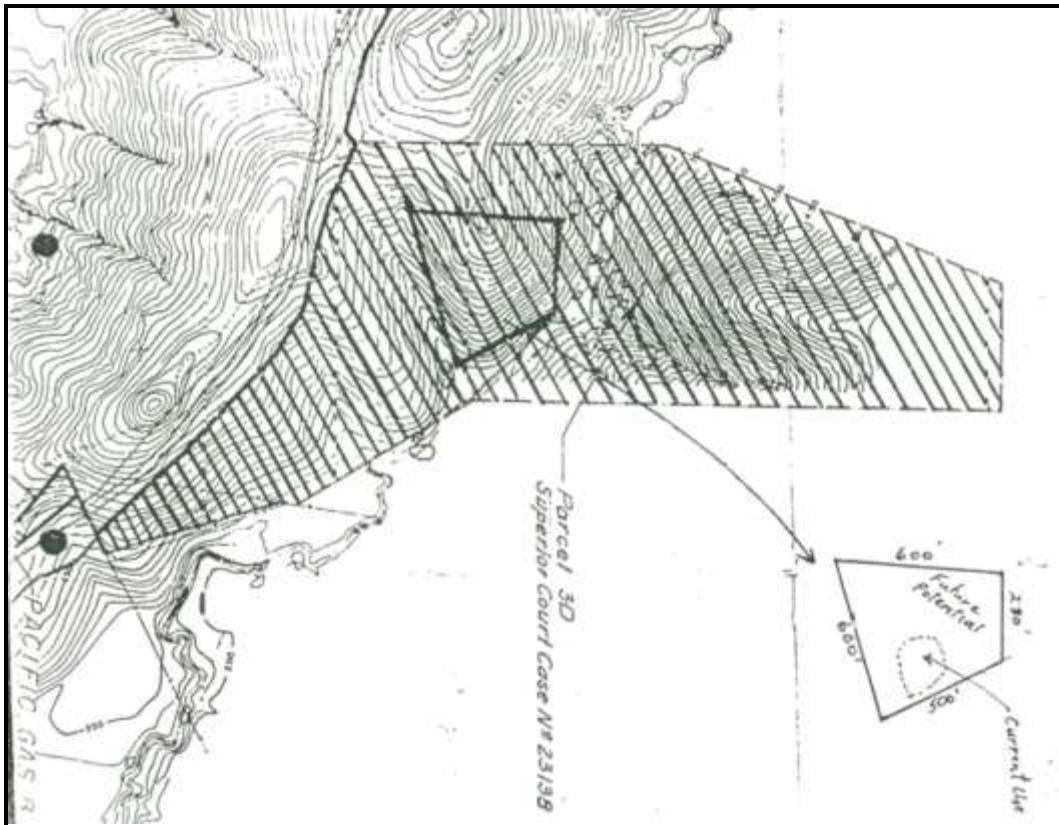


Figure 1 - Parcel 3D (As shown in Official Reclamation Plan Document)

To comply with SMARA, the County undertook an Inventory of Mines beginning in and around 1978 to determine where and what types of mines may have existed prior to January 1, 1976, and to issue required Reclamation Plans to those mines. During that process, the mine was identified as the “Cayucos Pit” in the Inventory of Mines in April 1979 (see Attachment B). The surface mine was granted a Certification of Vested Rights on March 31, 1980 (see Attachment A). In the application for vested rights, the mine is also identified as the “Cayucos Pit”. A Reclamation Plan, required to accompany any mining operation looking to obtain vested rights, was submitted and assigned Reclamation Plan # of M800403:2 (see Attachment C). The Reclamation Plan was approved by the County where the mine is referred to as the “Whale Rock Pit”. The mining site was originally used to excavate material for use in the construction of Whale Rock Reservoir and has been active since that time. On the basis of the Vested Rights Application, the companion Reclamation Plan Application, the Inventory of Mines, and the County issued “*Certification of Vested Mining Right*” letter, a recommended determination regarding the extent of vested rights has been provided based on the *objective evidence* contained in the documents submitted.

Review of inspection records and correspondence available in the mine inspection file yielded the following additional information:

In 1992 (the oldest inspection record in the inspection file) the County notified the Operator of the need to modify the approved Reclamation Plan # M800403:2. Notice of non-compliance continued through mine inspection reports and correspondence between the County and the Operator until 1999 (see Attachment D – Page 3 of 66).

From 2000 through 2002, the inspection reports indicated that the Operator was in the process of removing stockpiled material at the top of the quarry (outside of the vested mine boundaries and vested activities) and was in the process of establishing final slopes (see Attachment D – Page 25 to 30 of 66).

In 2003, the mine inspection report indicated that the Operator and the Inspector had come to an agreement on the “*overall size of the mining area*”. In July of 2003, the Inspector sent a letter to the Operator. The letter included an aerial photo with the mining boundaries overlaid on the aerial photo as

an attachment. The boundaries shown in the attachment were derived from maps included in the approved Reclamation Plan (see Attachment F – Page 17 to 18 of 30).

In 2005, the mine inspection report indicated that the Operator was again mining outside of the approved mining boundaries (on the southern side of the canyon). The report and follow-up correspondence from the County indicated that the operator would need to obtain a grading permit to rectify grading outside of the mining boundaries or apply for a use permit to expand the mining boundaries including a new reclamation plan (see Attachment D Page 35 to 36 of 66).

In August of 2007 the Operator submitted an application for a Conditional Use Permit and Reclamation Plan (DRC2007-00016) to “*expand mining area and update the reclamation plan*” (see Figure 2 - Receipt for Fee Payment and Figure 3 – Excerpt from County Application DRC2007-00016). The proposed project included approximately 37 acres of expansion / excavation area and would increase production to 150,000 cubic yards for 100 years. The existing processing and stockpile areas would remain and would be used for material processing and stockpiling for the proposed mine expansion.

Fees Associated with DRC2007-00016					
Fee Type	Revenue/GL Account	Fee Amount	Amount Due	Updated	By
L45-CUP/DP with IS	1420000-1000000000-142S21PDD	\$7,209.00	\$0.00	8/20/2007	LES
X34A-CDF Review-CUP/DP	1400000-1000000000- -405	\$600.00	\$0.00	8/20/2007	LES
X34B-Account Transfer Fee	1420000-1000000000-142S91PTR	\$11.00	\$0.00	8/20/2007	LES
X36A-AG Comm - MUP CUP	1410000-1000000000-141S52LDU	\$300.00	\$0.00	8/20/2007	LES
X36B-Account Transfer Fee	1420000-1000000000-142S91PTR	\$11.00	\$0.00	8/20/2007	LES
X73A-Public Works CUP Review	-1000000000-201R11N001 -4	\$529.00	\$0.00	8/20/2007	LES
X73B-Account Transfer Fee	1420000-1000000000-142S91PTR	\$11.00	\$0.00	8/20/2007	LES
L60-Reclamation Plan	1420000-1000000000-142S52PDM	\$5,397.00	\$0.00	8/20/2007	LES
X09A-RCD - SLO	-5908500000- -2601318	\$200.00	\$0.00	8/20/2007	LES
X09B-Account Transfer Fee	1420000-1000000000-142S91PTR	\$11.00	\$0.00	8/20/2007	LES
X10-Env Geologic Rev Major	1420000-1000000000-142S54PGE	\$2,252.00	\$0.00	8/20/2007	LES
Totals:		\$16,531.00	\$0.00		

Figure 2 - Receipt for Fee Payment

PROPOSED PROJECT Describe the proposed project (inc. sq. ft. of all buildings): <u>Expand Mining Area and update reclamation plan.</u>	
LEGAL DECLARATION I, the owner of record of this property have completed this form accurately and declare that all statement here are true. I do hereby grant official representatives of the county authorization to inspect the subject property	
Property owner signature <u>[Signature]</u>	Date <u>8/2/2007</u>
FOR STAFF USE ONLY Reason for Land Use Permit: _____	

Figure 3 - Excerpt from County Application DRC2007-00016

The project was accepted for processing and the County completed an Initial Study for the proposed project. After completion of the Initial Study, the County determined that an Environmental Impact Report (EIR) would be required. Based on the results of the Initial Study the County issued a Request for Proposal to prepare an EIR for the proposed project on December 1, 2010.

The County selected a consultant and worked on refining the scope of work associated with preparation of the EIR. On March 31, 2011 the County received a revised proposal from the EIR consultant to prepare an EIR for the proposed project. The final proposal to prepare the project EIR was presented to the Operator so the project could move forward through discretionary review process (a request for a Conditional Use Permit to expand the mining area and request to update the Reclamation Plan). No

response was received by the Operator regarding funding the EIR and continuing the permitting process. The County then began receiving correspondence from Harrison Temblador Hungerford & Johnson (attorney for the Operator) regarding the above referenced application (see Attachment E).

The position asserted by the Operator, in a letter dated July 16, 2011, is that “...the County Certification of Vested Mining Right and substantial supporting materials provided confirm that the Applicant is subject to vested mining rights, and does not require a new use permit.”

The County Department of Planning and Building does not agree with this opinion and the Operator filed suit against the County. In response to that litigation, the Operator and the County agreed to hold this Vested Rights Hearing in accordance with the procedures set forth in the stipulated judgment attached hereto as Attachment H. The procedures track those laid out in the California Code of Regulations and are consistent with applicable case law. The vested rights determination may then be used by the Operator and/or the County to evaluate a future course of action for the mine.

Local Ordinances:

1942: San Luis Obispo County (County) adopted its first zoning ordinance (Ordinance 101). The A-1 district is defined as all unincorporated territory of the County not included in other districts. The A-1 regulations required a use permit for quarrying only if the quarry was within 1,000 feet of a public street.

1953: The County adopted Ordinance 258, which amends the A-1 district regulations to exempt mineral resource extraction in east part of the County from requiring a use permit (Notice of Intent required) even if located within 1,000 feet from any public road or street; no use permit is required in other parts of the County unless the operation is within 1,000 feet of a public street.

1959: The County adopted Ordinance 427, superseding Ordinance 101. Among other changes, Ordinance 427 re-designated all unincorporated areas of the County (formerly designated A-1) as “U” (Unclassified) districts. The permitting requirements for mining were changed to again require a use permit for quarrying only if the quarry was within 1,000 feet of a public street or road.

1975: The County adopted Ordinance 1500, re-designating uses in various zoning districts and requiring County approval (a Conditional Use Permit – known as Departmental Review Uses) for mineral excavation in all districts. Conditional Use Permit is required where the excavation / mining activities include accessory processing facilities such as rock crushers and asphalt plants when located on the same property.

Also in **1975**, the California Legislature enacted the Surface Mining and Reclamation Act (SMARA), which requires all surface mining operations to obtain a reclamation plan covering operations after January 1, 1976, and requires operations commenced after that date to obtain a use permit.

Ordinance amendments occurred again in **1981, 1992, and 1994**; these amendments collectively represent the ordinance currently in place as described in Section 22.36.040B. of the County Land Use Ordinance (Title 22), consistent with the SMARA regulations.

Legal Standard:

Under both SMARA and Section 22.36.040 of the County Land Use Ordinance, the Whale Rock Pit is considered a nonconforming use of land because no use permit has been obtained to authorize surface mining on the subject property. If it was established legally at a time when no permits were required, the County’s ordinary nonconforming use ordinance (Section 22.72.050) would allow the mine to continue operating so long as the use was not enlarged, increased, discontinued, or extended to occupy greater area of land than was occupied when it became nonconforming. Under SMARA and California case law, however, surface mines are treated differently – they may establish a vested right to expand or move into areas not previously mined without being considered nonconforming.

The California Supreme Court decided in *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533 (“*Hanson Brothers*”) that surface mining operations may establish a vested right to mine into areas not previously mined pursuant to the “diminishing asset doctrine.” The diminishing asset doctrine recognizes that a “mineral extractive operation is susceptible of use and has value only in the

place where the resources are found.” Thus, “[u]nlike other nonconforming uses of property which operate within an existing structure or boundary, mining uses anticipate extension of mining into areas of the property that were not being exploited at the time a zoning change cause the use to be nonconforming.” (*Hansen Brothers*, 12 Cal.4th at p. 553.) Under the diminishing asset doctrine, a mining operation may establish a vested right to expand into a new area where **“there is objective evidence of the owner’s intent to expand [the] mining operation, and that intent existed at the time of the zoning change.”** (*Id.*; see also 14 Cal. Code of Reg. § 3951.)

Taking these concepts into account, SMARA and its implementing regulations deem a person to have a “vested right” to conduct surface mining operations “if, prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations.” (14 Cal. Code of Regs. § 3951; Public Resources Code § 2776(a).) The vested right may include (1) the area of mine operations, (2) the depth of mine operations, (3) the nature of mining activity, (4) the nature of material extracted, and (5) the quantity of material available for extraction. (14 Cal. Code of Regs. § 3951.) The regulations further acknowledge that expansion of operations “may be recognized as a vested nonconforming use under the doctrine of ‘diminishing assets’ as set forth in *Hansen Brothers*...” (*Id.*) The vested right is acknowledged for as long as it continues and “as long as no substantial changes are made in the operation.” (Public Resources Code § 2776(a).)

Section 22.36.040.B. of the Land Use Ordinance uses very similar language, allowing “persons who have obtained a vested right to conduct surface mining operation[s] before January 1, 1976,” to continue doing so without a conditional use permit “as long as the vested right continues and there are no substantial changes.” Subsection D of Section 22.36.040 defines a “vested right” using the same language as Public Resources Code section 2776(a). However, Subsection B requires a conditional use permit in the event “*if an existing mine is changed by increasing the on-site processing capabilities of the operation or by changing the method of mining (i.e. from mechanical to hydraulic technology), or the mine is expanded beyond the boundaries of the original surface mining site.*” This language is consistent with the examples of vested rights identified in Code of Regulation section 3951. But it needs to be read in conjunction with the *Hansen Brothers* decision to allow application of the diminishing assets doctrine, where appropriate. The purpose of this hearing is to establish the extent of the Whale Rock Pit’s vested rights, taking into account the legal standards discussed above.¹

Scope and Nature of Vested Mining Rights:

The following issues areas are the subject of this Vested Rights determination:

- Horizontal and Vertical Limits of the Mining Area
- Maximum Annual Production
- Type of Mining

Each of these issues areas will be presented below and a discussion will be provided which includes evidence from the various mining files on record with the Department of Planning and Building, information obtained from the Operator, as well as records obtained from the Office of Mine Reclamation (OMR). The information presented has been used to formulate the corresponding recommendation regarding the scope and nature of vested rights. The Operator’s position (as presented in Attachment E) has been summarized for each issue area based on Staff’s review of the information presented in Attachment E. Additional information may be presented by the Operator during the public hearing process regarding the interpretation of the information summarized by Staff. Key elements from the referenced documents, and corresponding information that was used in making the recommendation for this determination, are included below for ease of reference.

The ***Certification of Vested Rights*** dated March 31, 1980 recognized vested rights based on the Vested Rights Application that was submitted by Angelo Mainini (see Attachment A). This letter states, “*Your application for Certification of Vested Mining Rights has been authorized as complete and satisfactory by*

¹ The Board is being requested to make this determination through a noticed, public hearing process pursuant to the Court of Appeal’s decision in *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613.

our office. This Vested Right recognizes the existing right to continue surface mining on the subject property in accordance with all county ordinances governing surface mine activities. Failure to comply with applicable county laws may result in a revocation of this certification.”

The **Inventory of Mines** was completed in April 1979 (see Attachment B) and identified numerous components of the mining activities occurring at that time, including:

Total Acreage of Mine Parcel:	235 acres
Approximate acreage of Mine Site:	10 acres
On-site Processing Plant:	No
Type of Mining:	Pit Bank
Mineral Commodities Produced:	Red Rock
Current Production Per Year:	3,000 yards
Future Mining Plans:	More of Same

The approved **Reclamation Plan #M800403:2** (see Attachment C) was prepared to address reclamation of the proposed mining area when the County recognized the vested rights associated with this quarry. Items covered by the approved reclamation plan relevant to the vested rights determination include:

Line 7 Estimated Life of Operation:	10 years
Line 8 Conditional Use Permit Number:	None Required
Line 11 Raw Material Mined:	Red Rock
Line 12 Yield (In Tons or Cu. Yds. / Year):	8,000 Cu. Yards
Line 13 Type of Mine:	Borrow Pit
Line 15 Has Exploratory or Development Drilling been Utilized for this Operation?	No
Line 16 On-site Processing:	No
Line 22 Will Mining Progress in Separate Phases?	No
Line 25 Is Soil Salvage and Replacement Proposed?	Yes
Line 29 Will the Operation Involve Relocation, Blockage or Alteration of any Watercourse or Stream?	No
Line 31 Proposed Use Following Reclamation:	Grazing
Line 32 Total Acreage Included in Proposed Reclamation Plan:	6 acres
C-3: Describe the Access Route to the Mining Site:	Private Driveway to Cypress Mt. Road
D-1: Mineral (to be) Mined:	Red Rock
D-3: Detailed Geological Description of Mineral (to be) Mine:	Red Rock
D-4: Has Exploratory or Development Drilling been Utilized on the Mining Site?	No
D-5a: Known Surface and Subsurface extent and thickness of the mineral to be mined:	10-30 feet
D-5c: Detailed Description of all basic soil types to be Encountered on the mining site:	Red Rock and Clay Loam
D-5d – D-5j (For Rock Operations Only):	No information provided
F-1: Attach a Diagram Sketch of the Entire Mineral Processing System:	Material Bulldozed and Skiploaded to Trucks
G-4: Describe Method of Soil Salvage and Storage for Future Mine Reclamation:	Pile to One Side and Dozed to Grade Later
G-5: Describe the Method of Removing, Handling and Storing overburden:	Dozed into Stockpiles to be Spread Upon Reclamation

- H-1:** Will This Operation Involve the Relocation, Blockage, and/or Alteration of any Watercourse or Stream? No
- K-5:** Describe the Ultimate Physical Condition and Proposed Use(s) of Mined Lands as Reclaimed: Rehabilitated for Grazing
- K-6:** Describe how Reclamation of the Site, in this Manner, May Affect Future Mining at this Site and in the Surrounding Area: No effect – Limited surface deposit that when exhausted, land returns to grazing.

Horizontal Limits of the Mining Area: The following map (see Figure 4 – Reclamation Plan Map) which is included in the approved Reclamation Plan #M800403:2, provides the *objective evidence of the owner's intent to expand the mining operation* that has been relied upon in determining the horizontal extent of vested mining rights. While the County recognizes that this map is part of the approved Reclamation Plan, it is the only *objective evidence of the owner's intent to expand the mining operation* beyond the area shown as "future potential" (at the time the use became non-conforming and vested rights were recognized) that has been submitted by the Operator or is contained in the mining files. This map and other information summarized herein and contained in the Reclamation Plan, resulted in the *Recommended Determination* presented below.

Information presented by the Operator regarding the horizontal limits of vested mining rights is presented in Attachment E and is summarized by the following statement, *"The Quarry parcel was not within 1,000 feet of a public street or road in 1958. Further, under constitutional case law, vested rights extend throughout the entire Quarry parcel, which comprises 235 acres, as identified in the 1958 DWR condemnation action, the 1980 Reclamation Plan, and the County 1980 Certification of Vested Rights for the Quarry. Moreover, the County Code sets out specific review procedures for reclamation plan amendments. These procedures do not require a use permit for the mining operations contemplated in a reclamation plan amendment."*

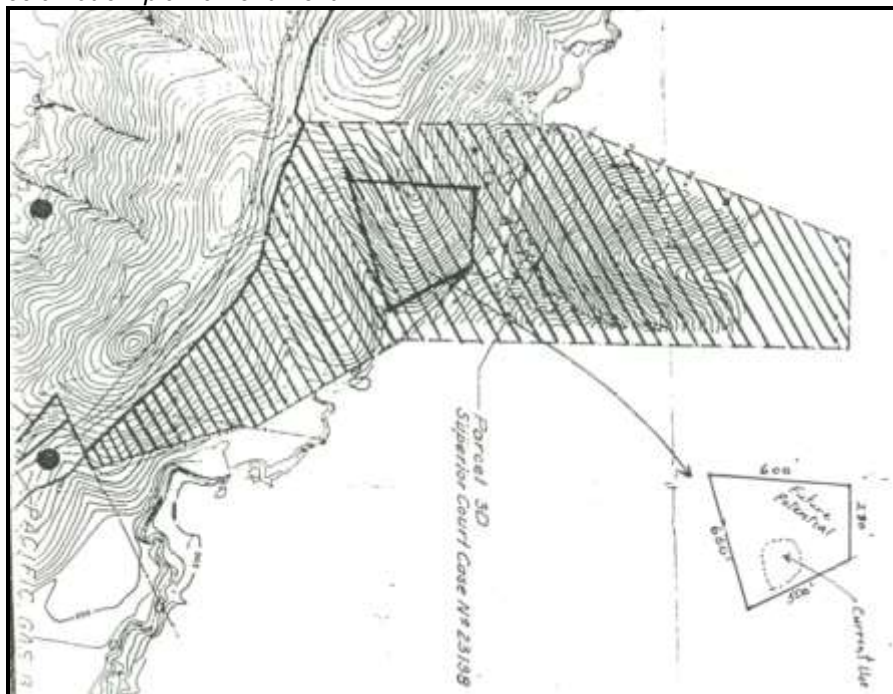


Figure 4 - Reclamation Plan Map. Source: Approved Reclamation Plan

To receive vested rights for the entire 235 acre parcel; based on review of historic Ordinances and subsequent amendments in affect at the time, a Conditional Use Permit would have been required because the parcel is located within 1,000 feet of Montecito Road (see Figure 5 and Figure 6). Montecito Road has existed in its current location (as shown in Figure 6) since before the Whale Rock Pit was in operation. The letter recognizing vested rights (see Attachment A) acknowledges this fact by stating,

“This Vested Right recognizes the existing right to continue surface mining on the subject property in accordance with all county ordinances governing surface mine activities. Failure to comply with applicable county laws may result in a revocation of this certification.” Therefore, the entire 235 acre parcel could not be vested under the rules in affect at that time the use was established, at the time it became non-conforming, as well as at the time of the recognition of Vested Rights.



Figure 5 - Distance from parcel to Public Road in 1958

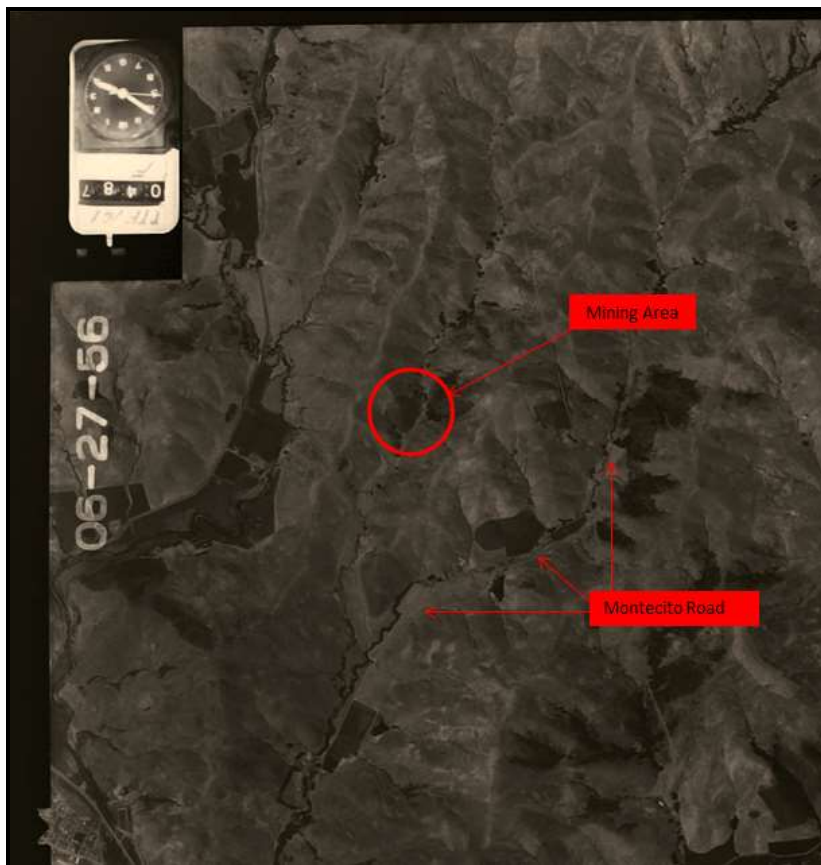


Figure 6 - 1956 Aerial Photo with Notations (Location of Montecito Road and Mining Site). Source: USGS

It is possible that Parcel 3D could have been vested based on the location of Parcel 3D in relationship to Montecito Road (see Figure 7- Parcel 3D overlaid on Aerial Photo) and the ordinance in place at the time of use became non-conforming. The County does not believe that the entirety of Parcel 3D is vested because the information that has been provided by the Operator regarding Parcel 3D being vested is limited to the information contained in the Interlocutory Judgment. The judgment's acknowledgement of the potential to mine all of Parcel 3D but is limited to a five year period. This information is contained in Exhibit 4 of Attachment E.

The Interlocutory Judgment describes Parcel 3D as a *"Five-Year Profit a Prendre"* which enables a person to take part of the soil or produce of land that someone else owns. It is a right to take from the land, as in the mining of minerals and is, therefore, distinguishable from an easement, which is a non-possessory interest in land generally giving a person a right of way on the property of another. The Judgment states in part, ***"...the sole and exclusive and unrestricted right to enter upon, occupy and use said real property from and after the date of entry of the Final Order of Condemnation herein for a period of five years from said date, and the right to remove from said real property during said five year period any and all such materials, to include but not limited to earth, rock, stone and gravel, as plaintiff may deem necessary for the construction, operation and maintenance of said public use; PROVIDED, HOWEVER, that at the expiration of said five year period the said plaintiff, its agencies, agents, employees and independent contractors shall quit and vacate said real property and shall leave for said defendants any access roads or ways constructed by plaintiff on said real property..."***

This information does not provide *objective evidence of the owner's intent to expand the mining operation* to the entire Parcel 3D because this agreement was for five years and the termination of the five year period did not acknowledge continued mining of the entire Parcel 3D. The judgment did acknowledge that the road would remain for ongoing use but no additional use of land was acknowledge in this or any other document presented to the County. **Therefore, mining the entire Parcel 3D should not be considered a vested mining right.**



Figure 7 - Parcel 3D overlaid on Aerial Photo. Source: Legal Description from Final Order of Condemnation file dated May 14, 1959.

Additional information detailed in the section below title "Vertical Limits of the Mining Area" including cross section dimensions (shown in Figures 8 and 9) lend further information to the *Recommended Determination*. Based on the evidence presented herein, it has been determined the Operator is mining outside of the boundaries of the vested mining area and beyond the horizontal limits of recognized vested mining rights. Section 22.36.040B. of the Land Use Ordinance states in part, "...**However, that Conditional Use Permit approval is also required if... or the mine is expanded beyond the external boundaries of the original surface mine site.**" Additionally, Public Resources Code Section 2776 states, "No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues **and as long as no substantial changes are made in the operation except in accordance with this chapter.**"

1. **Recommended Determination – Horizontal Limits of the Mining Area:**

Vested Rights associated with the **Horizontal Limits of the Mining Area** shall be limited to the area described as "current use" and "future potential" in Figure 4 - Reclamation Plan Map and Figure 9 – Cross Sections. No mining outside of the area identified in Figure 4 – Reclamation Plan Map and Figure 9 – Cross Sections shall be recognized as a vested mining right.

Vertical Limits of the Mining Area: The following documents (see Figure 8, 9 and 10) which are included in the approved Reclamation Plan #M800403:2, provide the *objective evidence of the owner's intent to expand the mining operation* that has been relied upon in determining the vertical extent of vested mining rights. While the County recognizes that this map is part of the approved Reclamation Plan, it is the only *objective evidence of the owner's intent to expand the mining operation* beyond the area being mined (at the time the use became non-conforming and vested rights were recognized) that has been submitted by the Operator or is contained in the mining files. This map and other information summarized herein and contained in the Reclamation Plan, resulted in the *Recommended Determination* presented below.

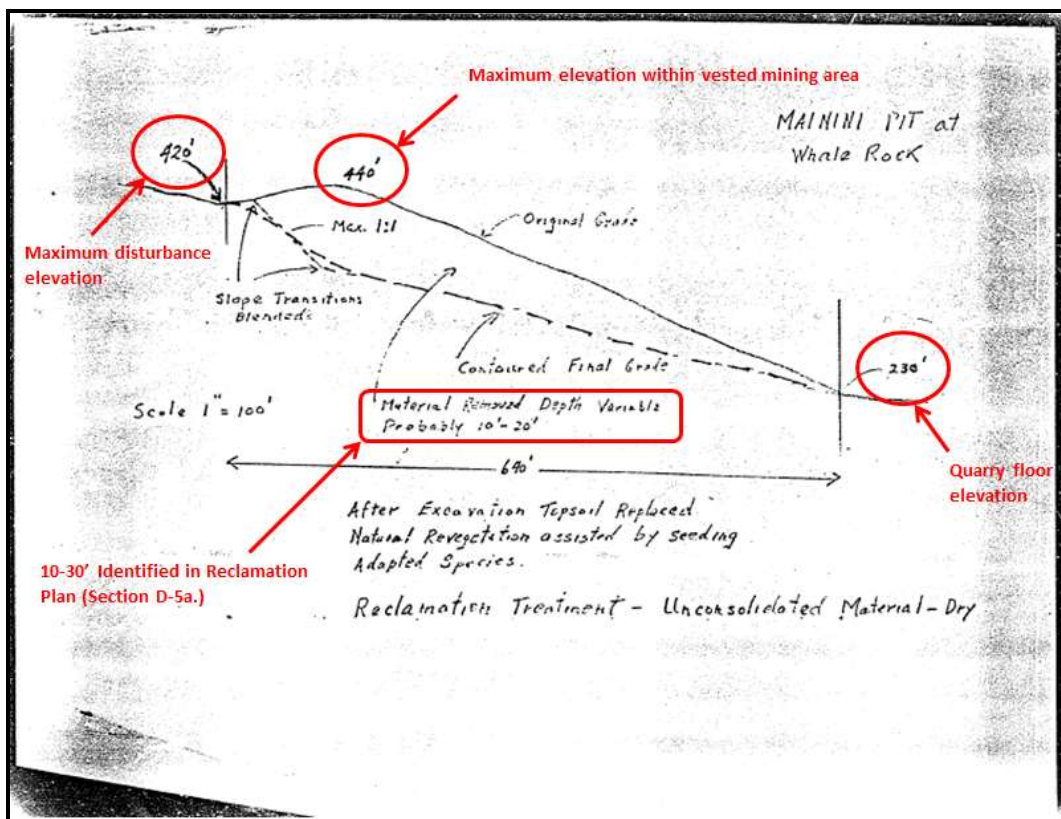


Figure 8 - Cross Section. Source: Reclamation Plan

No specific information regarding the vertical limits of mining has been presented by the Operator. Information presented by the Operator regarding the extent of vested mining rights is presented in Attachment E. The assumption that would likely accompany the Operator's position is that the horizontal limits of the mining area are only limited by the actual location of the material being mined within the 235 acre parcel. In order for this assumption to be recognized as a vested right to mine said area, *objective evidence* must be demonstrated. No such evidence has been provided beyond the information presented in Attachment E.

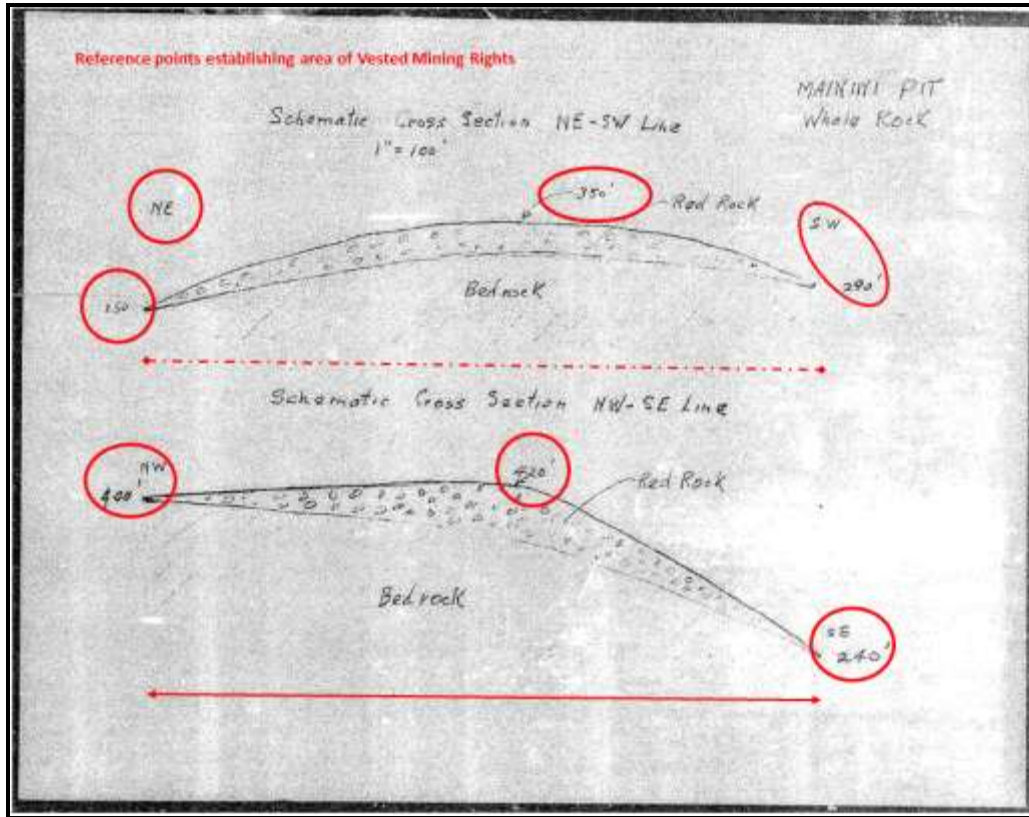


Figure 9 – Cross Section. Source: Reclamation Plan

Review of the information contained in the previously identified documents and summarized herein, has resulted in an understanding that mining was only anticipated to occur in the “Red Rock” portion of the deposit (or the unconsolidated materials) located within approximately 10 to 30 feet of the surface. No mining was anticipated in the consolidated rock formation below the “Red Rock”.

Where information was requested for “Rock Operations” (D-5d to D-5j), no information was provided. No exploratory drilling to identify mining beyond the unconsolidated material (Red Rock) was ever completed. Finally, the end use is identified as “grazing” would likely not be feasible based on the excavation that have taken place to date (see Figure 10 dated April 15, 1993). As shown in Figure 8, the final slope was intended to be a maximum of 1:1 with no benches (suitable for grazing land). No *objective evidence of the owner's intent to expand the mining operation* beyond the vertical limits referenced herein have been presented for consideration in this vested rights determination.

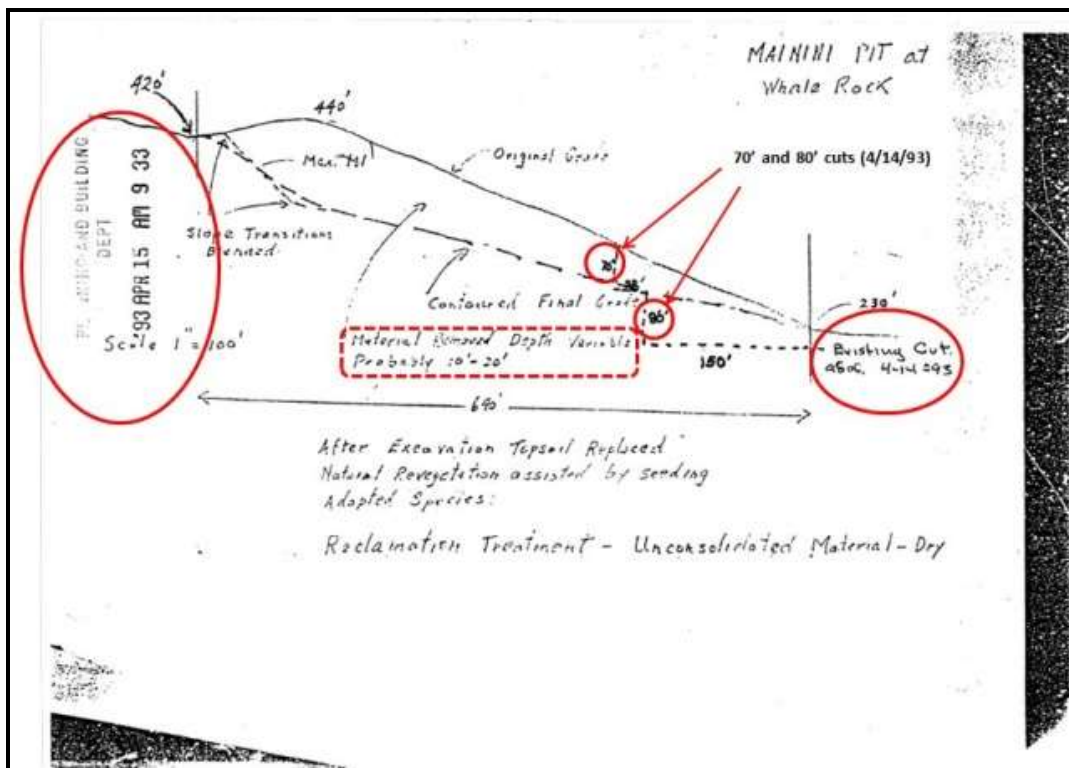


Figure 10 - Cross Section with Inspection Notes. Source: Inspection File

Based on the evidence presented, it has been determined the Operator is mining outside of the boundaries of the vested mining area and beyond the vertical limits of recognized vested rights. Section 22.36.040B. of the Land Use Ordinance states, “...**However, that Conditional Use Permit approval is also required if... or the mine is expanded beyond the external boundaries of the original surface mine site.**” Additionally, Public Resources Code Section 2776 states, “No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues **and as long as no substantial changes are made in the operation** except in accordance with this chapter.”

2. **Recommended Determination – Vertical Limits of the Mining Area:**

Vested Rights associated with the **Vertical Limits of the Mining Area** shall be limited to the unconsolidated material (i.e. Red Rock) within approximately 30 feet of the original ground surface. No mining of consolidated material (hard rock) shall be recognized as a vested mining right.

Maximum Annual Production: Attachment A, B, and C provide the *objective evidence of the owner's intent* that has been relied upon in determining the maximum annual production associated with the recognized vested mining rights. The following items are found in the above referenced documents and the information summarized herein resulted in the *Recommended Determination* presented below.

- | | |
|---|--------------------------|
| • Current Production Per Year (Inventory of Mines): | 3,000 cubic yards |
| • Future Mining Plans (Inventory of Mines): | More of same |
| • Line 7 - Estimated Life of Operation: | 10 years |
| • Line 12 - Yield (In Tons or Cu. Yds. / Year): | 8,000 cubic yards |

No specific information regarding the maximum annual production has been presented by the Operator beyond permits from the Air Pollution Control District (APCD) for processing equipment that is located on-site. Information presented by the Operator regarding the maximum annual production associated with vested mining rights is presented in Attachment E. An assumption that would likely accompany the

Operator's position that there is no production limit for the material being mined within the 235 acre parcel. In order for this assumption to be recognized as a vested right to mine any amount of material, *objective evidence* must be demonstrated. No such evidence has been provided beyond the information presented in Attachment E.

The Inventory of Mines states that the current production per year was 3,000 yards in 1979 with "*more of the same*" occurring in the future. The Reclamation Plan identified 8,000 cubic yards per year for an operational life of 10 years. Based on all the information in the County records related to production quantities, and the relatively short time frames in which the Reclamation Plan was approved and vested rights were recognized, the County recognizes a maximum annual production of 8,000 cubic yards per year. If the County recognized only 3,000 cubic yards per year, as identified in the Inventory of Mines, the Reclamation Plan could not have been approved. The information contained in the Reclamation Plan, which was approved within one week of issuance of the Certification of Vested Rights, was considered together and used to issue the Certification of Vested Rights. This is the only *objective evidence of the owner's intent* regarding future excavation quantities.

Review of available records regarding production quantities (beginning in 1990), indicate that production quantities have dramatically increased. For the five year period between 1990 and 1994, the operator produced less than 8,000 cubic yards per year four of those five years. Between 1995 and 2012, production quantities exceeded 8,000 cubic yards per year every year by an average of 26,583 cubic yards per year.

Based on the evidence presented, it has been determined the Operator is producing more material than has been recognized as a vested mining right. Section 22.36.040B. of the Land Use Ordinance requires a Conditional Use Permit "***...If an existing mine is changed by increasing the on-site processing capabilities of the operation or by changing the method of mining (i.e. from mechanical to hydraulic technology)...***" Additionally, Public Resources Code Section 2776 states, "*No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues and as long as no substantial changes are made in the operation except in accordance with this chapter.*"

3. **Recommended Determination – Maximum Annual Production:**

Vested Rights associated with the **Maximum Annual Production** shall be limited to the 8,000 cubic yards per year.

Type of Mining: Attachments B and C provide the *objective evidence of the owner's intended type of mining* that has been relied upon in determining the type of vested mining activities authorized for the Whale Rock Pit (at the time the use became non-conforming and vested rights were recognized). The following information and other information summarized herein resulted in the *Recommended Determination* presented below.

- | | |
|---|---|
| • Mine Property Description / Status – Type of Mining Operation (Inventory of Mines): | Pit Bank |
| • Line 13 - Type of Mine: | Borrow Pit |
| • Line 16 - On-site Processing: | No |
| • F-1: Attach a Diagram Sketch of the Entire Mineral Processing System: | Material Bulldozed and Skiploaded to Trucks |
| • D-5d – D-5j (For Rock Operations Only): | No information provided |
| • G-4: Describe Method of Soil Salvage and Storage for Future Mine Reclamation: | Pile to One Side and Dozed to Grade Later |
| • G-5: Describe the Method of Removing, Handling and Storing overburden: | Dozed into Stockpiles to be Spread Upon Reclamation |

No specific information regarding the vested rights for the type of mining that is currently occurring on-site has been presented by the Operator. Information presented by the Operator regarding the extent of vested mining rights is presented in Attachment E. Current activities that are occurring at the mining site include:

- Blasting
- Crushing
- Processing / Sorting
- Importation of Fill for Reclamation (stockpiling)
- Recycling

No *objective evidence* has been presented that **blasting** is a vested activity.

No *objective evidence* has been presented that **crushing** is a vested activity.

No *objective evidence* has been presented that **processing / sorting** is a vested activity.

The Operator has changed the method of mining. Based on the *objective evidence* that has been presented herein, the vested activity includes “Bulldozing and Skiploading to Trucks”. Pursuant to Section 22.36.040B. of the Land Use Ordinance, “...**changing the method of mining (i.e. from mechanical to hydraulic technology)**...” requires a Conditional Use Permit. Additionally, Public Resources Code Section 2776 states, “No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues **and as long as no substantial changes are made in the operation except in accordance with this chapter.**”

No *objective evidence* has been presented that **importation of fill for reclamation (stockpiling)** is a vested activity (see Figure 11).

No *objective evidence* has been presented that **recycling** is a vested activity (see Figure 12).

The Operator has introduced two new uses to the site. Based on the *objective evidence* that has been presented herein, the vested activities include “Pile to one side and dozed to grade later” and/or “Dozed into stockpiles to be spread upon reclamation”. Vested activities do not include “Importation of fill for reclamation (stockpiling)” or “Concrete and Asphalt Recycling”.

Pursuant to Section 22.52.060 of the Land Use Ordinance, a grading permit is required for stockpiling of materials.

Pursuant to Section 22.30.380 of the Land Use Ordinance, a Conditional Use Permit is required for concrete and asphalt recycling.



Figure 11 – Stockpiling. Source: Site Visit on April 25, 2014



Figure 12 - Current Recycling Activities. Source: Site Visit on April 25, 2014

The assumption that would likely accompany the Operator's position is that the material being encountered at the mining site necessitates the equipment and activities that is currently being used on the mining site. The equipment that is currently being used on site is shown in the "processing diagram" below (see Figure 13). Information contained in the various documents reference above indicates that processing of hard rock would not occur. Whale Rock Pit was intended to be a "Red Rock" "Borrow Pit", not a hard rock quarry. In order for the activities that are currently occurring to be recognized as a vested right, *objective evidence* must be demonstrated. No such evidence has been provided beyond the information presented in Attachment E.



Figure 13 - Current Processing Activities. Source: Operator

Based on the evidence presented, it has been determined the Operator is mining with different methods than have been recognized as a vested right. Section 22.36.040B. of the Land Use Ordinance requires a Conditional Use Permit if the existing mine is “...**changing the method of mining (i.e. from mechanical to hydraulic technology)**...”. Additionally, Public Resources Code Section 2776 states, “No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues **and as long as no substantial changes are made in the operation except in accordance with this chapter.**”

4. **Recommended Determination – Type of Mining:**

Vested Rights associated with the **Type of Mining** shall be limited to “dozing into stockpiles to be spread upon reclamation” and “pile to one side and dozed to grade later”.

Conclusion:

The County does recognize vested rights consistent with the diminishing asset doctrine but only to the extent that the operator has provided *objective evidence of the owner's intent to expand the mining operation* at or before the time the use became non-conforming and / or at the time of recognition of Vested Rights. Based on the evidence contained in the above referenced mining files and as presented by the Operator in Attachment E, the recommended determination for vested mining rights is contained in the following section.

Recommended Determinations:

1. Vested Rights associated with the **Horizontal Limits of the Mining Area** shall be limited to the area described as “current use” and “future potential” in Figure 4 - Reclamation Plan Map and Figure 9 – Cross Sections. No mining outside of the area identified in Figure 4 – Reclamation Plan Map and Figure 9 – Cross Sections shall be recognized as a vested mining right.
2. Vested Rights associated with the **Vertical Limits of the Mining Area** shall be limited to the unconsolidated material (i.e. Red Rock) within approximately 30 feet of the original ground surface. No mining of consolidated material (hard rock) shall be recognized as a vested mining right.

3. Vested Rights associated with the **Maximum Annual Production** shall be limited to the 8,000 cubic yards per year.
4. Vested Rights associated with the **Type of Mining** shall be limited to “dozing into stockpiles to be spread upon reclamation” and “pile to one side and dozed to grade later”. No Blasting, Crushing, Processing / Sorting, Importation of fill for reclamation (stockpiling), or Recycling shall be recognized as a vested mining right.

OTHER AGENCY INVOLVEMENT/IMPACT

Other agencies and county departments involved in this project include (but are not limited to):

- County Public Works
- County Counsel

FINANCIAL CONSIDERATIONS

This Vested Rights hearing was directed by a Stipulated Judgment from the Superior Court (Case Number: CV 130157) and no fees were paid associated with this hearing. Staff costs associated with the Vested Rights determination is covered by the Planning Department General Fund allocation. Further processing of a Conditional Use Permit and/or amendment to the approved Reclamation Plan #M800403:2 (as determined by your Board) would be subject to fees established in the adopted fee schedule.

RESULTS

This vested rights determination is consistent with communitywide results of a safe community, a prosperous community, a healthy community and a livable community.

If your Board adopts the attached Resolution (Attachment I) the Operator would be required to obtain a Conditional Use Permit and amend the approved Reclamation Plan #M800403:2 to allow the expansion of the mining area beyond the recognized vested mining boundaries and vested mining activities. The Reclamation Plan would need to be amended to address the proposed expansion area and to allow the importation of fill material (stockpiling) for proposed reclamation activities. A Conditional Use Permit would also be required to allow the recycling of concrete and asphalt on the mining site.

If your board determines that vested mining rights exist beyond the areas recommended by Staff, a Conditional Use Permit would not be required to expand the mining area. A Conditional Use Permit would still be required to amend the Reclamation Plan pursuant to Section 22.36.040B. and 22.36.050D.

ATTACHMENTS

Attachment A – Certification of Vested Rights
Attachment B – Inventory of Mines
Attachment C – Reclamation Plan
Attachment D – Mine Inspection Reports
Attachment E – Harrison Temblador Hungerford & Johnson letter dated July 7, 2011 with Exhibits
Attachment F – Mine Inspection Correspondence
Attachment G – Stipulated Judgment
Attachment H – Project Graphics
Attachment I – Resolution